No. 86-1693

IN THE

Supreme Court of the United States

October Term, 1986

In Re Grand Jury Subpoena Duces Tecum
Dated December 14, 1984.

Y, M.D., P.C.,

Petitioner,

v.

HON. EDWARD KURIANSKY,
Deputy Attorney General of the State of New York,
Respondent.

In Re Grand Jury Subpoena Duces Tecum
Dated December 14, 1984.

X, M.D.,

Petitioner,

v.

HON. EDWARD KURIANSKY,
Deputy Attorney General of the State of New York,
Respondent.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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Of Counsel:
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DONALD H. ZUCKERMAN

Questions Presented

1. WHETHER *UNITED STATES v. DOE* (465 U.S. 605) AND *FISHER v. UNITED STATES* (425 U.S. 391) HAVE CHANGED THE WELL-FOUNDED RULE THAT A CUSTODIAN OF RECORDS WHICH ARE REQUIRED BY LAW TO BE KEPT CANNOT PREVENT PRODUCTION OF SUCH RECORDS BEFORE A GRAND JURY BY CLAIMING A FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION? (THE NEW YORK COURT OF APPEALS ANSWERED THIS QUESTION IN THE NEGATIVE.)

2. WHETHER *UNITED STATES v. DOE* (465 U.S. 605) AND *FISHER v. UNITED STATES* (425 U.S. 391) HAVE CHANGED THE LONG-ESTABLISHED RULE THAT A CUSTODIAN OF CORPORATE RECORDS CANNOT PREVENT PRODUCTION OF SUCH RECORDS BEFORE A GRAND JURY BY CLAIMING A FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION? (THE NEW YORK COURT OF APPEALS ANSWERED THIS QUESTION IN THE NEGATIVE.)

List of Parties

The Petitioners are X, M.D.,[1] and Y, M.D.[2]

The respondent is Hon. Edward J. Kuriansky, New York State Deputy Attorney General for Medicaid Fraud Control.

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1. The New York State courts have permitted the petitioners, psychiatrists who are the targets of a New York County grand jury investigation, to utilize the anonymous designations "X" and "Y" in place of their real names.

2. Although the caption lists Y, M.D., P.C. as a petitioner (rather than Y, M.D.), the original moving party was Y, the individual, not the corporation. No substitution of parties has ever been effected.

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TABLE OF AUTHORITIES

Opinions Below

The opinion of the New York Court of Appeals, the judgment of which is sought to be reviewed, was filed February 19, 1987 and is reported at 69 N.Y.2d 232. It is set forth in the Petition for a writ of certiorari (hereinafter Petition), in the Appendix thereto, at 1a-12a.

The opinion of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, is reported at 113 A.D.2d 49, 495 N.Y.S.2d 365, and is set forth in the Appendix to the Petition, at 13a-22a. The opinions of the New York Supreme Court, New York County, Trial Term, have not been reported. They are set forth in the Appendix to the Petition, at 27a-29a ("Y") and 30a-32a ("X").

Jurisdiction

The judgment of the New York Court of Appeals was entered February 19, 1987.

The certiorari jurisdiction of the Court is invoked under 28 U.S.C. § 1257, subd. (3). However, such review may be had only of "[f]inal judgments or decrees," and the judgment sought to be reviewed herein is not final. This is so because the remittitur (*see infra* at A1[3]) of the New York Court of Appeals orders the trial court to conduct further proceedings, and these proceedings are not simply ministerial in nature.

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3. Numbers preceded by the letter "A" refer to pages in the Appendix to this brief.

Constitutional Provision Involved

UNITED STATES CONSTITUTION, AMENDMENT V

No person * * * shall be compelled in any criminal case to be a witness against himself * * * *

Statement of the Case

X and Y are psychiatrists, both of whom are authorized to provide services to Medicaid patients and to be paid therefor under the New York State Medicaid program. During the years 1981, 1982 and 1983, Medicaid paid Dr. X, a sole practitioner, a total of more than $213,000. During the same period Medicaid paid Y, M.D., P.C.[4] (whose sole shareholder, director and employee is Y) more than $222,000.

A New York County grand jury is currently investigating allegations of Medicaid fraud against X and Y, includ-

4. "P.C." is an abbreviation for "professional corporation." Professional service corporations are regulated in New York State by Article 15 (§§ 1501 *et seq.*) of the New York Business Corporation Law (hereinafter NYBCL). That Article contains sections regulating, *inter alia*, the organization (§ 1503), corporate name (§ 1512), rendering of professional service (§ 1504), professional relationships and liabilities (§ 1505), issuance of shares (§ 1507), transfer of shares (§ 1511), directors and officers (§ 1508) and disqualification of directors, officers, shareholders and employees (§ 1509) of professional service corporations. An annual statement is required to be filed by each professional service corporation. NYBCL § 1514. Except for two articles concerning foreign corporations, the provisions of the Business Corporation Law shall apply to professional service corporations, "except to the extent that the provisions thereof conflict with" Article 15. NYBCL § 1513. Moreover, under Article 9-A of the New York Tax Law, a professional service corporation is required to pay annual franchise taxes to New York State "for the privilege of exercising its corporate franchise." New York Tax Law § 209.

ing but not limited to the charge that they billed and were paid by Medicaid for medical treatment they claimed to have rendered to patients in New York at a time when, according to documentary evidence, they were physically outside the borders of the United States. Pursuant to this investigation, on or about December 14, 1984, X and Y were each personally served with a grand jury subpoena *duces tecum*. The subpoena to X required him to produce, for the period under investigation, "such records as [are] required by law to be kept, which reflect the evaluation and treatment" of certain named Medicaid patients. The subpoena served upon Y was addressed to "[a]ny Officer, Director or Managing Agent of [Y], M.D., P.C.," and required the corporation to produce patient charts for certain named Medicaid patients, along with corporate payroll records and personnel files.

X and Y moved to quash the subpoenas, invoking their constitutional privilege against self-incrimination, as well as New York's statutory physician-patient privilege. Trial Term found both claimed privileges to be inapplicable and denied their motions in all respects. Trial Term noted, *inter alia*, that X had conceded the subpoenaed documents to be required records, and held the "Fifth Amendment privilege cannot be asserted with respect to records which are required by law to be kept." As to Y, Trial Term held that many of the subpoenaed documents also constituted required records and moreover, because "a corporation has no Fifth Amendment privilege to assert * * * [Y] may not therefore withhold relevant materials on Fifth Amendment grounds."

On appeal to the Appellate Division, X and Y argued that, based upon *United States* v. *Doe*, 465 U.S. 605 (1984),

they possessed a privilege against self-incrimination in the contents of required records. Additionally, Y argued that, based upon *Doe, supra,* and *Fisher* v. *United States,* 425 U.S. 391 (1976), he possessed a fifth amendment privilege in the act of producing corporate documents. The appellate court rejected these arguments, holding: "We are in agreement with Criminal Term that petitioners' Fifth Amendment claims are unavailing for the reasons set forth in the trial court's opinions." However, the court modified on the physician-patient privilege issue, and remanded to Trial Term for a "judicial *in camera* examination of the subpoenaed medical records and personnel files."

Both sides appealed as of right to the New York Court of Appeals. Respondent Deputy Attorney General appealed to the New York Court of Appeals as of right, upon the ground that the Appellate Division order, "which finally determine[d] the action, * * * direct[ed] a modification thereof in a substantial respect." Former New York Civil Practice Law and Rules (NYCPLR) § 5601 (a)(iii). Similarly, X and Y both appealed as of right on the fifth amendment privilege issue, upon the ground that the Appellate Division order "finally determine[d] an action where there is directly involved the construction of the constitution." NYCPLR § 5601(b)(1). However, the Court of Appeals dismissed the appeals and cross-appeals on the ground that the order appealed from "does not finally determine the proceedings." 67 N.Y.2d 756 (1986). Subsequently both sides were granted permission by the Appellate Division to appeal to the New York Court of Appeals, pursuant to NYCPLR § 5602(b)(1) ("from an order of the appellate division which does not finally determine an action"). —— A.D.2d ——, 500 N.Y.S.2d 223 (1st Dep't 1986). *See* A3.

In the Court of Appeals X and Y conceded that there is no fifth amendment privilege in the contents of required records. Instead they contended that, under *Doe, supra,* they possessed a privilege against self-incrimination in the act of producing those records, while Y continued to argue that he possessed such a privilege concerning production of corporate documents. The New York Court of Appeals rejected these arguments, holding that "compliance with the subpoenas would not infringe the petitioners' Fifth Amendment rights." The court further ruled that neither *Doe* nor *Fisher* had changed the doctrines that "a custodian of corporate records may not refuse to produce them even though they may incriminate him personally • • • [and] the Fifth Amendment privilege may not be asserted with respect to records required to be kept by law."

The court also affirmed on the physician-patient privilege issue and remitted the case to Trial Term. It held remand to be necessary "because the petitioners had no opportunity to meet the standard we now establish" regarding that privilege. In the trial court petitioners will have an opportunity to show that the subpoenaed records (or portions thereof) contain "highly sensitive matter having no apparent relevance to the Medicaid investigation." Unless the Deputy Attorney General can then prove that the record in question "reasonably and minimally comes within the scope of the investigation," petitioners' claim of physician-patient privilege will be upheld, and the subpoenaed record will be redacted or withheld from the grand jury altogether.

X and Y thereafter jointly filed the instant petition for a writ of certiorari.

Reasons for Denying the Writ

I. The order sought to be reviewed is non-final

28 U.S.C. § 1257, upon which petitioners rely as authority for this Court to exercise jurisdiction over this case, constitutes the basis upon which "[*f*]*inal* judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court" (emphasis added). Absent finality, this Court lacks jurisdiction predicated upon section 1257. In the case at bar the judgment which is sought to be reviewed is non-final, and therefore § 1257 fails to confer upon this Court the jurisdiction to review it.

It is clear that, under the law of the State of New York, the order of the New York State Court of Appeals is non-final. Following determination of the appeal in the Appellate Division of the New York State Supreme Court, wherein that court had remanded the case to Trial Term for a "judicial in camera examination of the subpoenaed medical records and personnel files" (113 A.D.2d at 55, reprinted in the Appendix to the Petition at 21a), respondent Deputy Attorney General appealed to the New York Court of Appeals as of right, upon the ground that the Appellate Division order, "which finally determine[d] the action, * * * direct[ed] a modification thereof in a substantial respect." Former NYCPLR § 5601(a)(iii). Similarly, X and Y both appealed as of right on the fifth amendment privilege issue, upon the ground that the Appellate Division order "finally determine[d] an action where there is directly involved the construction of the constitution." NYCPLR § 5601(b)(1). However, by order entered Feb-

ruary 6, 1986, the New York Court of Appeals, *sua sponte*, dismissed the appeals and cross-appeals "upon the ground that the order appealed from does not finally determine the proceedings within the meaning of the [State] Constitution." 67 N.Y.2d 756. Subsequently both sides were granted permission to appeal to the New York Court of Appeals, pursuant to NYCPLR § 5602(b)(1) ("from an order of the appellate division which does not finally determine an action"). *See* A3.

Despite the order's being non-final under the law of the State of New York, "the designation given the judgment by state practice is not controlling." *Richfield Oil Corp.* v. *State Board*, 329 U.S. 69, 72 (1946). Rather, this Court must determine for itself whether the judgment sought to be reviewed is final. R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 121 (6th ed. 1986) [hereinafter cited as Stern, Gressman & Shapiro]. *See Cotton* v. *Hawaii*, 211 U.S. 162, 170-71 (1908); *Cole* v. *Violette*, 319 U.S. 581, 582 (1943); *cf. Gotthilf* v. *Sills*, 375 U.S. 79, 82 (1963) (Douglas, J., dissenting) (determination of state court that, as a matter of state law, order was not final "is binding on us," but does not preclude grant of *certiorari* in the interests of justice). In making that determination "the test is not whether under local rules of practice the judgment is denominated final * * * but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942). In short, the judgment "must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market Street*

Ry. Co. v. *Railroad Commission*, 324 U.S. 548, 551 (1945). "Traditionally, [this] Court also requires the state court judgment to be *final as to all* parties and *issues.* * * * If the remand leaves open some matter that is not merely ministerial * * * the judgment is normally deemed nonfinal and nonreviewable." Stern, Gressman & Shapiro, *supra* at 122 (emphasis added). *Houston* v. *Moore*, 3 Wheat. 433, 434 (1818); *San Diego Gas & Elec. Co.* v. *San Diego*, 450 U.S. 621, 632-33 (1981); *O'Dell* v. *Espinoza*, 456 U.S. 430 (1982).

Examined against this standard, the state court judgment herein is non-final because an *in camera* presentation is to be made by petitioners on the physician-patient privilege issue, which presentation may result in the grant, in whole or in part, of their motions to quash the grand jury subpoenas.

II. The question which arguably merits review by this Court is not presented in the case of X. In the case of Y, it is largely rendered moot by a second issue, not meriting Supreme Court review, which conclusively establishes respondent's right to all the records subpoenaed from X, and nearly all the records subpoenaed from Y, M.D., P.C.

This Court has previously agreed to review a final judgment, arising in the federal courts, which presented the question whether a custodian of corporate records possesses a fifth amendment privilege in the act of producing them. *In re Grand Jury Subpoena (See)*, 784 F.2d 857 (8th Cir. 1986), *cert. granted*,—— U.S.——, 107 S.Ct. 59 (1986), *petition dismissed*, —— U.S. ——, 107 S.Ct. 918 (1987).

Presumably, then, the question is worthy of Supreme Court review. However, resolution of this issue would not be dispositive of the cases at bar. Indeed, it is not presented at all in the case of X, who is a sole proprietor, not a corporation. Furthermore, in the case of Y, nearly all of the subpoenaed records are required by law to be kept. As Y cannot claim a fifth amendment privilege in required records (*Shapiro* v. *United States*, 335 U.S. 1 [1947]), this Court should await a better factual context within which to decide the corporate records question.

There is reason for petitioners to ask this Court to determine whether there exists a fifth amendment privilege in the act of producing corporate records. Since this Court interpreted the fifth amendment to protect the act of producing certain kinds of documents when the act is compelled, testimonial and incriminating (*Fisher* v. *United States*, 425 U.S. 391 [1976]; *United States* v. *Doe*, 465 U.S. 605 [1984]), the federal circuit courts of appeals have developed four different interpretations of the privilege's applicability to the act of producing corporate records.

The plurality of circuits has held, post-*Doe*, that no fifth amendment privilege may be asserted by a custodian of corporate documents. *See In re Grand Jury Subpoena (Lincoln)*, 767 F.2d 1130, 1131 (5th Cir. 1985); *United States* v. *Vallance*, 793 F.2d 1003, 1005 (9th Cir. 1986); *In re Grand Jury Proceeding (Vargas)*, 727 F.2d 941 (10th Cir.), *cert. denied*, 469 U.S. 819 (1984); *In re Grand Jury Subpoena Duces Tecum (Ackerman)*, 795 F.2d 904 (11th Cir. 1986); *see also In re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051, 1054 (1st Cir. 1980).

Two circuits have similarly held that no fifth amendment "act of production" privilege may be asserted by a custodian of corporate records who holds those documents in a representative capacity, a circumstance present in almost all cases. However, because in "certain limited circumstances" one may hold corporation records in a non-representative capacity (*see e.g., In re Grand Jury Subpoenas Duces Tecum*, 722 F.2d 981 [2d Cir. 1983] [former corporate officer stole documents][5]), in such situations the custodian may possess a fifth amendment privilege. Nevertheless, the corporation does not, and it is not relieved of its responsibility to produce the subpoenaed material. Therefore the corporation may be required to appoint a substitute agent,[6] one whose act of production would not be protected by the privilege against self-incrimination. *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 57 (2d Cir. 1985). *Accord United States* v. *Lang*, 792 F.2d 1235, 1240 (4th Cir. 1986).

Two circuits have held that a corporation must produce subpoenaed corporate documents. However, if the government, regardless of privilege, attempts to utilize the act of production to incriminate the producer, evidence of the production is subject to suppression. *See In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 148 (6th Cir.)

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5. *Cf. In re Grand Jury Subpoena (See), supra* (former corporate officer who stole documents but did not claim to possess them in a personal or individual capacity may not withhold records from grand jury).

6. Under state law in New York "[a]ny person may comply with a subpoena duces tecum by having the requisite books, documents or things produced by a person able to identify them and testify respecting their origin, purpose and custody." NYCPLR § 2305(b). In the cases at bar respondent has, consistent with the statute, always been willing to accept compliance with the subpoenas by a qualified substitute.

(en banc), cert denied, —— U.S. ——, 106 S.Ct. 594 (1985); *In re Grand Jury Subpoena (See), supra.*

Only the Third Circuit has held that a custodian of subpoenaed corporate records possesses a fifth amendment privilege such that he may not be held in contempt for failure to produce them, if the act of production would incriminate him. *In re Grand Jury Empanelled 3-23-83,* 773 F.2d 45, 47 (3rd Cir. 1985). In the courts below, X and Y asked that a position even more extreme than that of the Third Circuit be adopted: they moved to quash the subpoenas altogether. While their position may well be unreasonable and unsupported by any federal circuit court of appeals, nevertheless the diversity of views among the circuits may one day require resolution by this Court.

However, it is respectfully submitted these cases do not present the proper vehicle for such resolution. Although the appeals involving X and Y have been joined in the New York State courts, the underlying cases have significant factual differences. In the case of X the question accepted for review by this Court in *See* is not presented at all. X, as a sole proprietor, has been required to produce no corporate documents whatever. The subpoena served upon him commanded production only of records "required by law to be kept."

In *Shapiro* v. *United States, supra,* this Court established the rule that there is no fifth amendment privilege in required records. Whereas the circuit courts of appeals have differed as to the existence and effect of a fifth amendment privilege in the act of producing corporate records (in light of *Fisher, supra,* and *Doe, supra*), all circuits to have considered the question are unanimous in holding that

those cases fail to overrule *Shapiro* or to confer a fifth amendment privilege in the act of producing required records. *In re Two Grand Jury Subpoenae Duces Tecum Dated August 21, 1985*, 793 F.2d 69, 73 (2d Cir. 1986); *Matter of Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 336 n. 15 (3rd Cir. 1982), *aff'd in part, rev'd in part sub nom. United States* v. *Doe*, 465 U.S. 605 (1984); *In re Grand Jury Proceedings*, 601 F.2d 162, 171 (5th Cir. 1979); *In re Grand Jury Subpoena Duces Tecum (Underhill)*, 781 F.2d 64, 70 (6th Cir. 1986); *In re Grand Jury Proceedings (John Doe, M.D. and Steve Roe)*, 801 F.2d 1164, 1168-69 (9th Cir. 1986). Given the unanimity of opinion on the subject, the question whether, and to what extent, there exists a fifth amendment privilege in the act of producing required records does not merit review by this Court.

Similarly, while Y is custodian of the records of Y, M.D., P.C., and thus the question of fifth amendment privilege in the act of producing corporate records is presented as to him, nevertheless, as the New York Court of Appeals observed, "most of [the subpoenaed corporate documents] are also required to be kept by law" (Appendix to the Petition, at 8a; 69 N.Y.2d at 242), and must be produced for that reason. Therefore the question which arguably merits review by this Court will be dispositive of only a small percentage of the records whose production is commanded by the subpoenas at issue.

Under these circumstances, the cases at bar fail adequately to present a case or controversy over the claimed fifth amendment privilege in the act of producing corporate documents. Accordingly, this Court should await a genuine case or controversy, one whose outcome will turn on the resolution of this question.

Conclusion

For the above-stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Respondent pro se

Of Counsel:
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DONALD H. ZUCKERMAN

May 20, 1987

APPENDIX

Remittitur from the New York Court of Appeals

Remittitur

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Sol Wachtler, Chief Judge, Presiding

1 No. 10

In Re Grand Jury Subpoena Duces Tecum dated December 14, 1984.

Y., M.D., P.C.,

Respondent-Appellant,

v.

HON. EDWARD KURIANSKY, &c.,

Appellant-Respondent.

In Re Grand Jury Subpoena Duces Tecum dated December 14, 1984.

X., M.D.,

Respondent-Appellant,

v.

HON. EDWARD KURIANSKY, &c.,

Appellant-Respondent.

The appellant/respondent in the above entitled appeal appeared by Edward J. Kuriansky, Esq., Deputy Attorney

The above-named appellants and respondent each having moved for an order of this Court granting leave to appeal to the Court of Appeals from this Court's order (Appeal Nos. 23959-60N) entered on November 14, 1985,

Now, upon reading and filing the notices of motion with proof of due service thereof, and the papers filed in support of said motions and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that the motions be and the same hereby are granted and this Court, pursuant to CPLR 5713, certifies that the following question of law, decisive of the correctness of its determination, has arisen, which in its opinion ought to be reviewed by the Court of Appeals:

> "Was the order of this Court, which modified the orders of the Supreme Court, properly made?"

This Court further certifies that its determination was made as a matter of law and not in the exercise of discretion.

ENTER:

HAROLD J. REYNOLDS
Clerk.

General; the respondent/appellant appeared by Goldman and Hafetz, Esqs.; and Gerald B. Lefcourt, P.C.; the amici curiae appeared by Onek, Klein and Farr, Esqs.; and Hon. David Wait, N.Y.S. District Attorneys Association.

The Court, after due deliberation, orders and adjudges that the order affirmed, without costs. Question certified answered in the affirmative. Opinion by Chief Judge Wachtler in which Judges Kaye, Alexander, Titone, Hancock and Bellacosa concur. Judge Simons dissents in part and votes to modify by reinstating the orders of Supreme Court, New York County, in an opinion.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ Donald M. Sheraw

Donald M. Sheraw,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, February 19, 1987.

Order granting permission to appeal to the New York Court of Appeals

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 1, 1986.

Present—Hon. Leonard H. Sandler, Justice Presiding,
Joseph P. Sullivan,
E Leo Milonas,
Bentley Kassal,
Ernst H. Rosenberger, Justices.

M-977 & M-1154

[Appeal Nos. 23959-60N]

In re Grand Jury Subpoena Duces Tecum
Dated December 14, 1984,

Y.M.D., P.C.,

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Hon. Edward Kuriansky, Deputy Attorney General
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